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June 16, 2017

The Honorable William Alsup
U.S. District Court, Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

Re: *Waymo LLC v. Uber Technologies, Inc*., *et al*., No. C 17-00939-WHA

Dear Judge Alsup:

In response to the Court's Order (Dkt. 604), Defendants Uber Technologies, Inc. and Ottomotto LLC (collectively, "Uber") submit this précis describing two motions *in limine* that Uber recommends be heard in advance of the final pretrial conference: (1) to exclude any argument or evidence regarding, or designed to elicit, Uber's assertions of attorney-client privilege or work-product protection, and (2) to exclude evidence or argument regarding irrelevant and prejudicial character evidence garnering substantial media attention on Uber and its employees.

MIL # 1: Attorney-Client Privilege and Work-Product Protection

It is impermissible to draw an adverse inference from a party's invocation of the attorney-client privilege or work-product protection. *See, e.g., Knorr-Bremse Sys. Fuer Nutzfahrzeuge GMBH v. Dana Corp*., 383 F.3d 1337, 1344 (Fed. Cir. 2004) ("no adverse inference shall arise from invocation of the attorney-client and/or work product privilege"). Waymo conceded as much in its response to Uber's statement regarding privilege. (Dkt. 548 at 6.) The attorney-client privilege is designed to "encourage persons to seek legal advice, and lawyers to give candid advice, all without adverse effect." *Nabisco, Inc. v. PF Brands, Inc*., 191 F.3d 208, 226 (2d Cir. 1999) *abrogated on other grounds by Moseley v. V Secret Catalogue, Inc*., 537 U.S. 418 (2003) (citations omitted). If exercise of that privilege were to result in an adverse inference, "persons would be discouraged from seeking opinions, or lawyers would be discouraged from giving honest opinions. Such a penalty for invocation of the privilege would have harmful consequences." *Id.* Moreover, it is "fundamentally unfair to allow the introduction of" evidence or inference that would require the invoking party "to waive their attorney-client privilege to defend themselves." *Monterey Bay Military Hous., LLC v. Pinnacle Monterey LLC*, No. 14-CV-03953-BLF, 2015 WL 4593439, at *4 (N.D. Cal. July 30, 2015); *see also McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*, 434 F. Supp. 2d 810, 812 (E.D. Cal. 2006) ("Indeed, how can the court honor the shield of the attorney-client privilege and then allow [the plaintiff] to use it as a sword to prove its case?").

While acknowledging this rule, Waymo has proposed what it claims are permissible uses of Uber's assertion of attorney-client and work-product privilege. (Dkt. 548 at 4-5.) But every one of Waymo's proposals is just an adverse inference by another name.

For example, Waymo asserts that the Court should permit it to introduce Uber's privilege invocations "where necessary to provide context or educate the jury as to why certain categories of evidence have not been presented" or to "comment on a lack of evidence." (*Id.*) Such "context," "education" and invitation to "comment" would be permission to draw adverse inferences. Telling the jury that Uber asserted privilege would leave the jury "to speculate why" Uber "would not reveal its counsel's opinion. It is inescapable that the jury would likely conclude that" Uber "received an unfavorable opinion, otherwise" Uber "would reveal it. This is precisely the negative inference *Knorr* prohibits." *McKesson*, 434 F. Supp. 2d at 812 (excluding evidence or argument regarding assertion of attorney-client privilege over an opinion of counsel). Accordingly, it is improper to inform the jury about the assertion of the privilege ***at all***, because there is no probative value in such evidence apart from the forbidden negative inference. *Id.*; *see also Beraha v. Baxter Healthcare Corp.*, No. 88 C 9898, 1994 WL 494654, at *3 (N.D. Ill. Sept. 6, 1994) ("[T]he only purpose for which [plaintiff] seeks to admit evidence of the fact that these communications occurred is to enable the jury to draw an adverse inference therefrom. This is exactly what is prohibited."); *Corning Optical Commc'ns Wireless Ltd. v. Solid, Inc.*, No. 5:14-CV-03750-PSG, 2015 WL 5569095, at *1 (N.D. Cal. Sept. 22, 2015) (same); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-CV-2768, 2016 WL 278054, at *2 (E.D. Pa. Jan. 22, 2016) (same).[1]

Nor does the "scope, breadth, and centrality" of Uber's claims of privilege transform an impermissible inference into a permissible one. (Dkt. 548 at 4.) It is no secret that Waymo seeks to introduce Uber's privilege assertions, via log or otherwise, to persuade the jury that there was some nefarious purpose to the assertion of fundamental legal privileges. In order to combat such an inference, Uber would have to reveal the contents of its communications with counsel to demonstrate that there was no such scheme—which is prejudicial and "fundamentally unfair." *Monterey Bay*, 2015 WL 4593439, at *4; *U.S. Rubber Recycling, Inc. v. ECORE Int'l, Inc.*, No. CV0909516SJOOPX, 2011 WL 13127343, at *8 (C.D. Cal. Oct. 5, 2011) ("It would be prejudicial for Plaintiff to imply that Defendant's invocation of the privilege was an improper cover-up from which the jury should imply bad faith."). There is no authority to suggest that "the volume of communications with counsel somehow removes the case from" this rule. *Sprint Commc'ns Co. L.P. v. Comcast Cable Commc'ns LLC*, No. 11-2684-JWL, 2015 WL 1204975, at *2 (D. Kan. Mar. 17, 2015) ("plaintiff cannot circumvent its inability to rely on defendants' retention of counsel by pointing to the sheer volume of privileged communications, as such

[1] Proposed Rule of Evidence 513, which the Supreme Court proposed in accord with "the weight of authority," counsels that in "jury cases, proceedings shall be conducted . . . so as to facilitate the making of claims of privilege without the knowledge of the jury." 56 F.R.D. 183, 260 (1972). California law likewise provides that "no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." Cal. Evid. Code § 913(a). Both Proposed Rule of Evidence 513 and the California statute are persuasive guidance to this Court. *See Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (courts in this jurisdiction can "seek guidance" from Proposed Rules of Evidence, because they constitute "a comprehensive guide to the federal law of privilege," and from "state privilege law—here, California's—if it is enlightening").

evidence would still create the impermissible choice for defendants between revealing privileged communications and suffering the adverse inference that the advice was unfavorable"). Indeed, the number of items on a privilege log is simply a function of breadth of the discovery requests. In a case involving an enormous (and one-sided) discovery effort, as this one, there is nothing inherently unusual about claiming privilege over 3,500 documents. *See In re Imperial Corp. of Am.*, 174 F.R.D. 475, 478–79 (S.D. Cal. 1997) (reasoning that most of the "hundreds of thousands, if not millions of, documents" produced were subject to attorney-client or work product privilege); *In re High-Tech Employee Antitrust Litig*., No. 11-CV-2509-LHK, 2013 WL 772668, at *1 (N.D. Cal. Feb. 28, 2013) (in which Google claimed privilege on over 2,800 logged documents).

MIL # 2: Evidence of Irrelevant and Unfairly Prejudicial Character Evidence About Matters Garnering Substantial Media Attention on Uber and Its Employees

There has been a substantial amount of media attention directed at Uber pertaining to internal and external investigations, such as sexual harassment investigations and the Holder Report,[2,3] and Greyball and associated criminal investigations.[4] None of these investigations or any other alleged misconduct by Uber or any of its employees is relevant to the claims and defenses at issue in this case and would not tend to make any fact "of consequence" in this case "more or less probable." Fed. R. Evid. 401. Additionally, such evidence would be inadmissible under Rule 404(b), which bars evidence of a "wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b). Waymo's only purpose for seeking to introduce such evidence would be to show that Uber has acted in this case in conformity with unrelated wrongs. This is exactly the type of propensity evidence Rule 404(b) prohibits. *See Sibrian v. City of Los Angeles*, 288 F. App'x 385, 387 (9th Cir. 2008) (evidence of prior misconduct excluded because it "shows nothing about whether . . . in different circumstances" any wrong was committed). Nor is such evidence admissible for a proper 404(b) purpose, such as motive, intent, or knowledge. *Id*. 404(b)(2). Evidence of Uber's or its employees' conduct on matters unrelated to the facts of this case would also be offered only for the unfairly prejudicial purpose of painting Uber in a negative light, and would distract the jury from the case before it. Fed. R. Evid. 403; *see also Martin v. City of Barstow*, No. EDCV1302193ABSPX, 2015 WL 12743591, at *1 (C.D. Cal. Nov. 5, 2015) (excluding evidence of other incidents involving the defendants "which gained media attention and which are unrelated to Plaintiff" under Rules 401 and 403 because they are "irrelevant and would likely waste time, confuse the issues, and unfairly prejudice Defendants"); *Torres v. City of Chicago*, No. 12 C 7844, 2015 WL 12843889, at *9 (N.D. Ill.

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[2] Mike Isaac, *Uber Investigating Sexual Harassment Claims by Ex-Employee*, N.Y. Times, Feb. 19, 2017, https://www.nytimes.com/2017/02/19/business/uber-sexual-harassment-investigation.html (last visited June 16, 2017).

[3] *Uber Report: Eric Holder's Recommendations for Change*, N.Y. Times (June 13, 2017), https://www.nytimes.com/2017/06/13/technology/uber-report-eric-holders-recommendations-for-change.html (last visited June 16, 2017).

[4] Mike Isaac, *Uber Faces Inquiry Over Use of Greyball Tool to Evade Authorities*, N.Y. Times (May 4, 2017), https://www.nytimes.com/2017/05/04/technology/uber-federal-inquiry-software-greyball.html (last visited June 16, 2017).

Oct. 28, 2015) (excluding "any references to unrelated police misconduct, including recent instances of alleged misconduct that have received broad media attention" on the grounds that "[s]peculation that there may be instances in which such evidence might be inadmissible is insufficient" to overcome the "highly inflammatory and prejudicial" nature of the evidence).

For the same reasons, the Court should exclude evidence or argument regarding this Court's criminal referral to the United States Attorney's Office because such evidence is irrelevant under Rule 402 and unfairly prejudicial under Rule 403. *F.D.I.C. v. Refco Grp., Ltd.*, 184 F.R.D. 623, 626 (D. Colo. 1999), *as corrected* (Mar. 31, 1999) (excluding evidence of FDIC's criminal referral to U.S. Attorney's Office on the grounds that "any probative value" was outweighed by the risk of undue prejudice and the potential for misleading the jury given the referral's "speculative nature and the lack of any criminal charges"); *J.W. v. City of Oxnard*, No. CV 07-06191 CAS(SHX), 2008 WL 4810298, at *2 (C.D. Cal. Oct. 27, 2008) (excluding evidence of criminal investigation into police officer regarding same misconduct alleged in § 1983 case on the grounds that "evidence regarding the fact that the criminal investigation took place . . . is not relevant and may cause unfair prejudice").

Similarly, the Court should exclude inflammatory argument, evidence, and hearsay testimony concerning the character of Uber's CEO, Travis Kalanick. As a public figure, Mr. Kalanick is the subject of articles, news reports, and blog posts, many of which purport to depict Mr. Kalanick, his leadership style, and his personality. In addition to being inadmissible hearsay, this kind of evidence about Mr. Kalanick has no bearing on whether Waymo has any cognizable trade secrets, whether Uber misappropriated any trade secret, whether Uber has infringed any Waymo patent, and whether Waymo has suffered any damages as a result. Fed. R. Evid. 402. Moreover, Rule 404(a) prohibits the use of such character evidence about Mr. Kalanick to show that a party acted in conformity with that character on a particular occasion because such evidence would be "of slight probative value and may be very prejudicial." *Cohn v. Papke*, 655 F.2d 191, 194 (9th Cir. 1981) (internal citation and quotation marks omitted); *see also United States v. Whittington*, 26 F.3d 456, 466 (4th Cir. 1994) (holding testimony that defendant had conducted her affairs "like a rat or a snake" was improperly admitted character evidence). Even if evidence of Mr. Kalanick's character were admissible under Rule 404, it and other such inflammatory evidence should be excluded under Rules 402 and 403 as irrelevant, more prejudicial than probative, and a waste of time.

In short, Uber deserves an impartial jury who will fairly assess the evidence presented at trial. As Uber previously stated to this Court, Uber will present evidence at trial that will rebut Waymo's assertions that Uber took no steps to prevent alleged misappropriation, that Uber knew Levandowski deliberately downloaded files before leaving his employment at Waymo, that Uber possessed the alleged downloaded files, and that Waymo's asserted trade secrets are, in fact, trade secrets. (Dkt. 531 at 2.) "The right to a fair trial is the most fundamental of all freedoms . . . [and] is not solely individual in nature; it is an essential part of the architecture of American constitutional democracy." *United States v. Farhad*, 190 F.3d 1097, 1105 (9th Cir. 1999) (internal citations and quotation marks omitted). It is in everyone's interest that Uber receive the fair trial to which it is entitled, uncontaminated by unrelated, inflammatory, and inadmissible propensity evidence, which "[n]o curative instruction could cure." *Smith v. Smith*, 215 F.3d 1334, 2000 WL 357267, at *2 (9th Cir. 2000). Any evidence of unrelated investigations, this

Court's referral to the U.S. Attorney, or improper character evidence about Mr. Kalanick would unfairly prejudice Uber's right to a fair trial and should be excluded.

Respectfully Submitted,

/s Karen L. Dunn

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